Comment on Recent Cases

Administration of Estates of Decedents: Right of Devisee of Land Subject to Mortgage to Exoneration of Mortgage.—The question discussed and decided in Estate of De Bernal[1] with respect to the right of the devisee of land, upon which a mortgage rests, to insist that the mortgage be paid out of the other assets of the testator's estate seems not to have been raised in this jurisdiction for forty-six years, though the questions are such as one might expect to arise with some frequency. The facts in the case were sufficient to warrant the court in holding that the testator actually intended that the specific devisees of a tract of land should have the land freed from a mortgage which the testator had placed upon it, and the court very wisely placed the decision upon this manifest intention. But the opinion of the Court discusses the question, generally, without reference to the circumstances of the particular case, and concludes, as a general proposition that the specific devisee of land is entitled to have the same exonerated from a mortgage executed by testator, at the expense of the residuary legatee and devisee, in cases where there is no direction to the contrary in the will. Another interesting point decided was with respect to the disposition of rents upon the devised land. These should not be used as a primary fund by the executor to pay debts, (including the mortgage), but the specific devisee of the land was entitled to have the residuary fund exhausted before these rents were applied.

Both these points were in effect decided by the Estate of Woodworth in 1867.[2] But the system of administration has been radically changed since the date of that case by the amendments of 1874 to the Code of Civil Procedure.[3] When the Woodworth case was decided, the personal property was the primary fund for the payment of debts; by the amendment referred to, personal and real property are equally subject to the payment of debts. A general devise of a fractional part of all the testator's lands, which were subject to a mortgage, was, in the Woodworth case, held to be entitled to be exonerated from the mortgage at the expense of the personal estate.

The Court in the principal case does not seem to give sufficient emphasis to the changed conditions of administration. The matter of the exoneration of a devise of mortgaged property, under the doctrines even of the Court of Chanrery, is said by Mr. Maitland to be a "muddle,"[4] and the difficulties of the subject are not made less by citing

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[1] (Supreme Court, March 26, 1913) 45 Cal. Dec. 453.

[2] (1867) 31 Cal. 595.

[3] Code Amendments, (1873-74), p. 367; Code Civil Procedure, section 1516.

[4] Maitland, Equity, 213. For modern cases, see 3 L. R. A. (N. S.) 898.

text writers and authorities dealing with situations where the personalty is still the primary fund for the payment of debts. It is not correct to say, in California, as the Court does, citing Page on Wills,[5] that the devisee of land is still entitled to have the debts paid out of personalty, and is, therefore, entitled to have a mortgage upon the property devised to him discharged out of that fund. It is doubtful if that ever was the basis of the rule, which seems rather to be founded upon the presumption that the testator by giving the mortgage augmented his personal property, which in equity ought therefore to relieve the land. Indeed, if it appeared that his personal estate had not been benefited by the mortgage, the right of exoneration on behalf of the devise did not exist in the equitable administration of estates.[6]

It would seem to be very plain that the California law on this subject at the present day does not depend at all upon the distinction between real and personal property, which for all purposes of administration seem to be considered as on precisely the same footing. But a specific legatee of a chattel was always entitled in equity to have the chattel exonerated from mortgages and charges placed upon it by the testator. A specific devisee of land, therefore, should be entitled to the same right.[7]

It may seem an unimportant matter whether we follow the general authorities with regard to the devise of land or whether we follow those with respect to bequests of specific chattels, for in the case at bar both lead to the same result. But it may become essential later to determine, when we have to consider the question as to what words will prevent the application of the rule, whether the right arises out of a presumed equity arising from the augmentation of the personalty by the proceeds of the mortgage, or whether it arises merely from presumed intention, as in the case of specific legacies. For example, it has been frequently held that a devise of land "subject to a mortgage," which is described, does not alter the application of the general rule. The words are construed as words of description and not showing an intent to relieve the personal estate. On the other hand, it would seem that such words would be sufficient to indicate an intention that the legatee of a chattel was to take it cum onere.[8]

It should be noted that the rule with regard to devises of lands, as originally established in chancery and generally followed in the United States, has been changed in England by Locke King's Act. The act is practically adopted by an act of the New York legislature.[9]

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[5] Page, Wills, sec. 765.

[6] 2 Jarman, Wills, pp. 1446, 1453 (6th Amer. Edition).

[7] 2 Woerner, American Law of Administration, sec. 494 (2d edition); Bothamley v. Sherson, (1875), L. R. 20 Eq. 304; Fitzwilliams v. Kelly, (1852) 10 Hare 259; Knight v. Davis, (1833) 3 My. and K 358; Brainerd v. Cowdrey, (1843) 16 Conn. 1.

[8] 2 Jarman, Wills, p. 1443.

[9] 2 Woerner, American Law of Administration, sec. 494.

These changes seem to indicate a belief that the rule did not express the actual intention of testators,—a belief that has been shared by eminent conveyancers.[10] O. K. M.

Adverse Possession: Possession by Married Woman.—In Madden v. Hall,[1] and Mattes v. Hall,[2] the owner of land left it in the possession of an agent. The wife of the agent, claiming the land as her own, but without any written instrument of title, and without notice to the owner of her adverse claim, held the land for the period of the statute of limitations and complied with the provisions respecting payment of taxes. Under these circumstances it was held that she did not acquire a title.

The case is doubtless correctly decided. She came into possession rightfully, through her husband, and it is in accord with well settled principles that her subsequent act of claiming possession for herself could not affect the real owner unless notice of the repudiation of her tenancy was actually brought home to him.[3]

The Court, however, rests its opinion upon the proposition that a married woman, while not separated from her husband, cannot acquire title by adverse possession, unless she has "color of title." The doctrine of "color of title" seems to have travelled far from its original source. Invented by the American courts to supply a need not felt in England, it allowed a possessor of only a portion of an entire tract to extend, by legal construction, his possession to the limits designated in the document under which he claimed.[4] Possession under color of title is not synonymous with possession in good faith, for one claiming under a parol gift does not claim under color of title. Yet it has been held that a married woman claiming under a parol gift may acquire title by adverse possession, even while living with her husband. To say generally, that a married woman, living with her husband, is wholly unable to maintain an adverse possession without color of title, as the Court seems to have done in the cases named, is, perhaps, stating the matter too broadly. The present condition of the authorities would seem to limit the ability of a married woman, while living with her husband, to acquire title to land by prescription, to cases where her original possession was acquired by consent of the former possessor.[5] Whether she entered under "color of title" in the technical sense is, therefore, immaterial.

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[10] Mr. Jarman says: "It is probably in general the case" that the "devisee was intended to take cum onere." 2 Jarman, Wills, p. 1445.

[1] (District Court of Appeal, Third Appellate District, March 25, 1913), 16 Cal. App. Dec. 614.

[2] (District Court of Appeal, Third Appellate District, March 25, 1913), 16 Cal. App. Dec. 605.

[3] 2 Tiffany, Real Property, sec. 443. The recent case of Gernon v. Sisson, 16 Cal. App. Dec. 249 (decided February 7, 1913), applies this principle to the case of a grantor remaining in possession after the date of the conveyance to his grantee.

[4] 23 Harvard Law Review, 56.

[5] See cases cited in note in Ann. Cas. 1912A, 570.